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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. ~~1385~~ 156

WERT LANELVIN AKINS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTRODUCTORY STATEMENT

The petitioner, Wert Lanelvin Akins, respectfully petitions for a writ of certiorari to review a judgment and order made by the Court of Appeals for the Sixth Circuit reported as *United States* v. *Akins*, 372 F.2d 291 (C.A. 6, 1967), affirming a judgment against the petitioner made

and entered by the United States District Court for the Western District of Tennessee, Western Division, on July 6, 1965 (App. 351a).

The opinion of the Court of Appeals is appended and bound with this petition (App. A).

This case was decided by the United States Court of Appeals for the Sixth Circuit on February 6, 1967, and judgment was entered that date. The Court of Appeals granted a motion to extend the time for filing a petition for rehearing until March 18, 1967. The petition for rehearing was denied on April 3, 1967. The Court granted a motion to stay mandate pending application for certiorari until May 12, 1967.

Rule 16(e) of the Rules of the Court of Appeals for the Sixth Circuit permit the use of an appendix record on appeal, under the authority conferred by Rule 75(1) of the *Federal Rules of Civil Procedure*. The petitioner filed a printed appendix in the Court of Appeals, and no appendix was filed by the respondent. The Clerk of the Court of Appeals for the Sixth Circuit filed with the Clerk of this Court a certified copy of the record and proceedings in this case. The references to the record in this petition are to the printed Appendix to Brief of Defendant-Appellant filed in the court below, nine additional copies of which were forwarded to the Clerk of this Court by the Clerk of the Court of Appeals for the Sixth Circuit.

JURISDICTIONAL STATEMENT

Petitioner believes this Court has jurisdiction to review the decision by writ of certiorari by virtue of *28 USC 1254(1)*.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the search warrant used by the Federal officers in this case violated the *Fourth Amendment* and the *Fifth Amendment* in that said warrant was (A) not founded on probable cause; (B) an evidentiary search warrant; and (C) a general search warrant.

2. Whether the trial court's charge, when read as a whole, sets forth an accurate statement of the law of entrapment as applied to the facts of this case.

3. Whether the undisputed testimony of the prosecution's witnesses establish entrapment as a matter of law.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves *18 USC 1952* and *Amendments IV, V, IX* and *X* to the *Constitution of the United States*, the full text of which are appended in Appendix B.

STATEMENT OF THE CASE

There are no substantial conflicts in the evidence in this case. Petitioner was found guilty by a jury on five counts of a six-count indictment charging him with causing gambling supplies and equipment to be shipped in interstate commerce with the intent of carrying on an unlawful gambling business in Tennessee, in violation of *18 USC 1952*.

Petitioner owned and operated a professional gambling casino known as the "Turf Club" in Tipton County, Tennessee, some eighteen to twenty miles North of Memphis, in violation of the laws of the State of Tennessee, from January of 1962 until the date of his trial.

Carl T. Stahl operated a games and gaming equipment business known as Taylor and Company in Chicago, Illinois. For some time prior to 1964, FBI Agents had been conducting an investigation of Stahl's operations in Chicago.

About the middle of May, 1964, John Glenville, an FBI Agent in their Chicago office, talked with Stahl relative to his business. The Agent said that Stahl would have to go down to the U. S. Attorney's office and sign a Cease and Desist Agreement (App. 279a)

Stahl called his attorney, Sherman C. Magidson, and on or about May 22, 1964, Stahl and Magidson met with FBI Agent John Glenville and a Mr. Reagan, who was an Assistant United States Attorney in Chicago (App. 301a).

Stahl, Magidson, Glenville and Reagan went through Stahl's catalog and specified merchandise which Stahl could send in interstate commerce. Cards, chips and dice were orally designated as items which Stahl could send lawfully through interstate commerce to any point in the country (App. 302a). They discussed all of the matters for approximately four hours (App. 302a).

In July of 1964, Magidson received a draft of the agreement from Reagan. He made several corrections and sent the draft back to Reagan (App. 304a).

Magidson was later sent a final draft which was signed by Stahl either in the last week in September of 1964 or the first two weeks in October of 1964 (App. 314a). The record is not clear whether Stahl read the agreement or was furnished a copy of it.

Magidson made a photocopy of the agreement before Stahl signed it and kept it in his file (App. 310a). The photocopy of the unsigned and undated agreement was

entered in evidence (App. 354a). There is nothing in the record to indicate that the agreement signed by Stahl was ever entered by any court or approved by the government.

During this time, FBI Agents interviewed the petitioner at his residence in Memphis on two different occasions about the 23rd day of January, 1964, and about the 15th day of May, 1964 (App. 169a, 174a, 175a, 226a, 228a and and 240a). FBI Agents also made visits to the petitioner's property located in Tipton County about the 13th day of May, 1963, about the 15th day of May, 1963, and about the 30th day of March, 1965 (App. 118a, 119a, 149a, 171a, 174a, 223a, 224a, 101a, 102a). On each of the occasions, the FBI Agents found no violation by petitioner of the anti-racketeering statute (App. 225a, 226a, 227a and 228a).

Prior to September of 1964, Stahl had never sold merchandise to the petitioner (App. 281a). Petitioner telephoned Stahl during September of 1964, prior to Stahl signing the agreement, and Stahl informed the petitioner that he had cleared with the United States Attorney and the FBI that it was legal for Stahl to ship to the petitioner poker chips, playing cards and dice (App. 281a). During the conversation, petitioner inquired whether Stahl could ship him a layout, which is felt cloth with numbers printed on the cloth (App. 282a). Stahl informed the petitioner that layouts were illegal to ship and the petitioner informed Stahl to forget about the layout, that he did not want one if it was illegal (App. 282a).

Based upon the representations made by Glenville and Reagan, as relayed to the petitioner by Stahl, the petitioner ordered the playing cards, dice and poker chips

from Stahl, the merchandise was shipped on five different occasions, and the petitioner was convicted of doing the very act that Reagan and Glenville orally represented to Stahl was lawful.

One of the FBI Agents who conducted the search testified that he did not see the search warrant until after the petitioner's property had been searched and his property removed from the premises (App. 89a). FBI Agents examined the petitioner's personal papers situated in his desk and made notes from his personal papers, including some of his checks (App. 140a-141a).

The search was conducted on May 19, 1965. The officers seized several hundred items, amounting to about a "truck load" of petitioner's property, including ten firearms, hand guns, rifles, shotguns, a roulette table and wheel and three dice tables (App. 17a, 151a), under the authority contained in the search warrant (App. 11a) to seize "other material used in the business enterprise involving gambling."

At the conclusion of the respondent's proof, the petitioner moved that all of the evidence and information obtained by the officers be withdrawn and excluded from consideration by the jury and that the evidence and information be suppressed (App. 297a); renewed the motion to suppress (App. 297a); and moved for a judgment of acquittal upon the grounds that the proof showed that entrapment was established as a matter of law (App. 298a). All of the motions were overruled (App. 299a).

The petitioner called only one witness, Sherman C. Magidson, the attorney for the witness Stahl, who substantiated the testimony of Stahl given on cross-examination.

The trial court charged the jury (App. 336a) that the entrapment was lawful if the petitioner was not an innocent person, *or* if the petitioner were engaged in similar activities or crimes, *or* was ready and willing to violate the law. The petitioner made four special requests (App. 347a-350a), which were refused (App. 325a). The granting of the special requests would have cured the charge given by the trial court, and would probably have cured the argument of counsel for the government (App. 327a-328a).

REASONS FOR GRANTING THE WRIT

The decision rendered by the Court of Appeals for the Sixth Circuit is in conflict with a decision of the Court of Appeals for the District of Columbia Circuit on the same matter. The charge given by the trial court on the question of entrapment is in direct conflict with a charge denounced in *Hansford* v. *United States*, 303 F.2d 219 (C.A. D.C., 1962).

The Court of Appeals for the Sixth Circuit in rendering this decision of necessity decided an important question of federal law which has not been, but should be, settled by this Court. The question is subsidiary to and fairly comprised within Question One herein, and is whether the seizure of evidentiary objects other than private papers violates the *Fifth Amendment*, and whether the "Gouled rule" is a dying doctrine.

The Court of Appeals for the Sixth Circuit decided a federal question involving searches and seizures in a way in conflict with applicable decisions of this Court, including *Gouled* v. *United States*, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921); *Aguilar* v. *State of Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Stanford* v. *State of Texas*, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965).

ARGUMENT

1. Whether the search warrant used by the federal officers in this case violated the Fourth Amendment and the Fifth Amendment to the Constitution of the United States in that said warrant was (a) not founded on probable cause; (b) an evidentiary search warrant; and (c) a general search warrant.

We are indebted to Burt Marks, Esquire, of the Beverly Hills, California, bar, for his kindness in furnishing us a copy of his petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit filed in *Katz* v. *United States*, No. 895, facts and opinion, 369 F.2d 130 (C.A. 9, 1966), certiorari granted, 87 S.Ct. 1021 (1967). The question last above stated is paraphrased from the question stated by Mr. Marks, adding only the reference to the *Fifth Amendment* as noted by Mr. Justice Bradley in *Boyd* v. *United States*, 116 U.S. 616, at 633, 6 S.Ct. 524, 29 L.Ed. 746, at 752 (1886):

> "We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment, and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on an 'unreasonable search and seizure' within the meaning of the Fourth Amendment."

The search warrant in *Katz* (369 F.2d at 134, footnote 4) described the things to be seized as:

> "* * * certain property, namely bookmaking records, wagering paraphernalia, including but not limited to bet slips, betting markers, run down sheets,

schedule sheets indicating the lines, adding machines, money, telephones, telephone address listings which are designed and intended for use as the means of committing criminal offenses in violation of Title 18, United States Code Section 1084, and violations of 441, 4412 and Section 7203 of the Internal Revenue Code."

We are also indebted to Albert R. Turnbull, Esquire, of the Charlottesville, Virginia, bar, for his kindness in furnishing us a copy of all of the briefs filed in *Warden of The Maryland Penitentiary* v. *Hayden*, No. 480, facts and opinion, 363 F.2d 647 (C.A. 4, 1966), certiorari granted 87 S.Ct. 290 (1966), argued April 12, 1967.

There are some facets of this case similar to *Berger* v. *State of New York*, No. 615, facts and opinion, 18 N.Y.2d 638, 272 N.Y.S.2d 782 (1966), and *Serao* v. *United States*, No. 869, facts and opinion, 367 F.2d 347 (C.A. 2, 1966).

On page 2 of the Brief for the United States as Amicus Curiae in *Warden*, it is stated:

"We recognize, of course, that Rule 41(b) of the Federal Rules of Criminal Procedure presently authorizes the issuance of search warrants only for the search and seizure of fruits or instrumentalities of crime."

As suggested by our benefactor, Mr. Marks, because of the seizure of items not specifically described in the warrant, assuming it was not too general, the entire search must be declared invalid since the validly seized items cannot be served from the invalidly seized items. See *Marcus* v. *Search Warrants*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961).

A prerequisite to any United States Court or Commissioner acquiring jurisdiction to issue a search warrant under the provisions of *18 USC 1952*, must be an allega-

tion, and probable cause supporting the allegation, that someone "* * * travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to * * *" do the things prohibited by the statute. The affidavit (App. 13a) does not establish that Casey knew, of his own knowledge, that petitioner used a facility in interstate commerce; or that petitioner admitted that he used a facility in interstate commerce; or that a reliable or credible person informed Casey that the records he examined were the records of Taylor and Company.

All that appears from the affidavit is that Casey observed gambling in progress, which did not violate any laws of the United States; that the petitioner admitted he operated a gambling establishment known as the Turf Club, which did not violate any laws of the United States; that Casey examined some records, which he concluded, on information not available to the United States Commissioner, were the records of Taylor and Company of Chicago, and that from this examination, he suspected, believed or concluded that the petitioner had caused Taylor and Company to ship gambling supplies to the petitioner in Memphis for use at his gambling enterprise in Tipton County.

The only "illicit" part of the gambling business, according to the laws of the United States, was the use of the things which had traveled in interstate commerce. There are no federal common law crimes. The warrant makes no attempt to limit the search to those items of personal property which Casey had probable cause to believe were traveled in violation of the laws of the United States, and which might be termed contraband, but included items which could only be used as "mere evidence." Some of

the items of personal property not having traveled in interstate commerce, but described "as other material" in the affidavit for search warrant and the search warrant, were actually introduced in evidence at the trial.

On July 4, 1776, a small group of revolutionaries made some libelous statements regarding the "present King of Great Britain." That King and the petty officers to which it would be directed would have appreciated the warrant in this case. It is a wonder that one "truck load" handled it all.

The United States Commissioner who signed the warrant should not have been surprised if the agents brought back to him all the personal clothing worn by the employees, toilet tissue, food, draperies, telephone fixtures and wires, gas fixtures and lines leading to the property, electric lines, the lawn mower, lightbulbs and light fixtures, ash trays and all of the cleaning utensils and supplies. All of those items traveled in interstate commerce, and their use certainly facilitated the operation of the business. All could have been seized under the "other material" directive in the warrant.

Mr. Justice Butler delivered the opinion of this Court in *Marron* v. *United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231, 237 (1927) in which it was held:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

If each Special Agent now in the employ of the FBI were to make an independent search of the Turf Club in an honest attempt to execute the warrant to the letter, it

would be a surprise to this writer if any of the Agents seized the same number of things, much less the same items.

The government's reliance on *Marron* and *Steele* v. *United States, No. 1,* 267 U.S. 498, 45 S.Ct. 414, 69 L.Ed. 757 (1925) to justify the description of the things to be seized is misplaced. Every place where intoxicating liquors were being unlawfully sold was, under the terms of the National Prohibition Act, declared to be a common nuisance. The entire places in *Marron* and *Steele* were common nuisances and unlawful, according to the laws of the United States. The carrying on of a gambling business unlawful under state law is not contrary to federal law. It is only the traveling in interstate commerce and later use of things to facilitate the carrying on of the business which is contrary to federal law.

We do not believe that *Marron* stands for the proposition that the records of a business illicit in its entirety under the laws of the United States are instrumentalities of a crime committed against the United States. See *Leahy* v. *United States,* 272 F.2d 487, 491 (C.A. 9, 1959) and *Katz* v. *United States,* 369 F.2d 130, 134 (C.A. 9, 1966). We do know, however, that *Marron* does not stand for the proposition that in the search of a gambling establishment, the same descriptive particularity is not as necessary as it would be in the case of stolen property or goods, notwithstanding *Nuckols* v. *United States,* 99 F.2d 353 (C.A. D.C., 1938); *Merritt* v. *United States,* 349 F.2d 19 (C.A. 6, 1957); and *Clancy* v. *United States,* 276 F.2d 617 (C.A. 7, 1960).

The warrant in this case was not founded on probable cause; it was an evidentiary search warrant, a general search warrant and a writ of assistance; it was contrary

to the rights guaranteed to the people by the *Fourth Amendment* and by the *Fifth Amendment;* it violated the rights reserved by the people by the *Ninth* and *Tenth Amendments;* and is directly contrary to the following decisions of this Court: *Boyd* v. *United States,* 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886); *Weeks* v. *United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); *Gouled* v. *United States,* 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921); *United States* v. *Lefkowitz,* 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932); *Harris* v. *United States,* 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947); *Aguilar* v. *State of Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Stanford* v. *State of Texas,* 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965).

The last thing which we wish to be is less than direct and concise in this petition. We realize that the "mere evidence" or the "Gouled rule" was exhaustively briefed in *Warden* and *Berger;* however, there are two points which we think important.

The first is that despite the claim by the United States that there is no historical support for the proposition that the *Fourth Amendment* was intended to forbid searches for evidentiary matter other than private papers, no authority other than *Entick* v. *Carrington,* 19 Howell's State Trials, 1029 (1765) was cited to show what was the common law in England between 1740 and 1791. There must be additional authority available in England, if it is not available here.

The State of Maryland argued that the "Gouled rule" causes much confusion and inconsistency and does not accomplish any legitimate purpose. There are countries

on this planet whose law enforcement does not cause confusion or inconsistency, but those law enforcement agencies are not limited by the common law, as is ours. The government and the State of Maryland forget that there were many patriotic Americans who opposed the writing down of a bill of rights. To Alexander Hamilton a bill of rights was more than unnecessary. It would be dangerous, he said. "Why declare that things shall not be done which there is no power [in Congress] to do?" Catherine Drinker Brown, *Miracle at Philadelphia* (1966), page 245.

James Wilson told a meeting of Pennsylvania citizens, "Enumerate all the rights of men? I am sure that no gentleman in the late Convention would have attempted such a thing." *Miracle,* supra, page 245.

To complete their list of unalienable rights, Noah Webster suggested a clause, "that everybody shall in good weather, hunt on his own land, and catch fish in rivers that are public property * * * and that Congress shall never restrain any inhabitant of America from eating and drinking, at seasonable times, or prevent his lying on his left side, in a long winter's night, or even on his back, when he is fatigued by lying on his right." *Miracle,* supra, page 246.

A bill of rights was thought by some to be redundant, and by others to be dangerous, for if the Convention adopted a list of ten, twelve or twenty articles, the courts would later limit the rights retained and powers reserved by the people to those rights and powers specifically enumerated in the list.

The first Congress of the United States on March 4, 1789, adopted a twelve-article bill of rights. The next to the last article became the *Ninth Amendment* and the

last article became the *Tenth Amendment*. The first two articles were never ratified, but the final ten articles became a part of the Constitution on December 15, 1791.

The precise reason why the last two articles were included in the list was to remove any possibility that the courts would later limit the rights and powers the people enjoyed at common law to those rights and powers specifically enumerated in the list; otherwise, there would be no reason whatsoever for the *Ninth* or *Tenth Amendments*.

The Attorney General, the Solicitor General, the State of New York and the State of Maryland have asked this Court to do precisely what the proponents of the Constitution promised the Antifederalists would never be done, to make the *Ninth* and the *Tenth Amendments* an empty promise. The States of California and New Jersey have already repealed the *Ninth Amendment* at the urging of modern text writers who have not yet had the educational experience of having their homes searched for five hours. See Appendix C for an affidavit for search warrant form used throughout the State of Mississippi. That form recognizes the "mere evidence" rule and has led neither to confusion nor inconsistency in that State.

We take the *Ninth* and *Tenth Amendments* to mean that all the rights the people enjoyed at common law were retained by the people, and all the powers the people enjoyed at common law were reserved to the people. The rights and powers which the people had at common law were "frozen" by the *Ninth* and *Tenth Amendments*. One of the rights retained by the people was judicially determined by this Court in *Boyd, Weeks, Silverthorne* and *Gouled*. That retained right was to be free of searches or seizures for "mere evidence."

The rule at common law, frozen by the *Ninth Amendment*, was well stated on page 15 of the brief for petitioner in *Warden*:

> "It requires that relevant evidence, reasonably obtained, be excluded if it cannot technically be classed as a means or instrumentality of committing a crime, the fruits of a crime, or contraband."

The writer of this petition resides in a State where the *Fourteenth Amendment* is regularly denounced by the elected public officials of that State. Those who do not like the *Fourteenth Amendment* and those who do not like the "mere evidence" rule have a remedy, but it is not with the courts. It is by constitutional amendment.

It is important that the people be assured that the fears of certain signers of the Constitution, including Alexander Hamilton of New York, James Wilson of Pennsylvania, Roger Sherman of Connecticut and John Dickinson of Delaware, that the courts would limit the rights and powers of the people to those specifically enumerated in the first eight amendments, were ill founded, and that the statute of limitations has not run on the promises made to the Antifederalists by the proponents of the Constitution.

2. Whether the trial court's charge, when read as a whole, sets forth an accurate statement of the law of entrapment as applied to the facts of this case.

It should be noted at the onset that there is no testimony in the record to show that the petitioner was ready or willing to commit the offense charged, and the trial court erred in giving any "propensity" charge to the jury. *United States* v. *Collier*, 313 F.2d 157, 159 (C.A. 7, 1963). Once having undertaken to give a "propensity" charge, the trial court had a duty to charge the jury correctly. Instead, the trial court charged (App. 336a) that there is no

entrapment unless "the defendant had no previous disposition to violate *the law*" (Emphasis ours), and entrapment is not established if the defendant "was ready and willing to violate *the law*." (Emphasis ours)

The popular name for the above type instruction is a "Show me" instruction. The instruction is highly misleading and derives its name from the following quotation: "Show me a liar and I will show thee a thief." George Herbert, *Jacula Prudentum* (1640). George Herbert would have instructed the jury in this manner: "Show me a man who will carry on an unlawful gambling business in Tennessee and I will show thee a man who will use a facility in interstate commerce to facilitate the carrying on of such unlawful gambling business."

The charge which would have been given by George Herbert and the charge given by the trial court are, for all practical purposes, identical.

The charge as given might pass muster in a case absent evidence of any predisposition to violate state law, but it will not wash in a case where there is ample evidence of such predisposition.

The prejudice to the petitioner is apparent. There was considerable uncontradicted proof that the petitioner, for approximately three years prior to the date of his trial, had been engaged in running and operating a gambling business establishment in violation of several statutes of the State of Tennessee, and, in fact, the indictment so charged. Certainly, to a lay jury, such would seem to constitute similar acts or crimes and would indicate to the jury that the petitioner was ready and willing to violate "the law." Reading as a whole the charge given on the question of entrapment, it is clear that it was the trial court's understanding of the law to be that if the

petitioner were ready and willing to violate any law whatsoever, then he could not claim entrapment, and the trial court so charged the jury in very nearly those exact words.

In the jails of every state in this Union are persons who are convicted time after time for "being drunk in a public place." They violate "the law" every time they can beg, borrow, steal or earn adequate funds with which to intoxicate themselves. Under the charge here, those poor devils could never successfully plead entrapment to any charge, because they are "ready and willing to violate *the law:*".

In *Hansford* v. *United States,* 303 F.2d 219, 221 (C.A. D.C., 1962), the defendant was convicted of the sale, possession, and importation of narcotic drugs in violation of Federal statutes. The trial judge instructed the jury that where the defense is entrapment,

> "the law says that if an otherwise innocent person, not inclined to commit a criminal offense, is induced, is led into, is enticed by a police officer to commit a criminal offense, the prosecution can have no benefit from it and he would be not guilty. Understand that I say an 'otherwise innocent person' who would not have committed the crime except for some enticement, or inducement."

The Court in *Hansford,* (303 F.2d at 222) further stated:

> "The court did not explain to the jury, as here explained to counsel, that the court meant 'A man who would not have sold narcotics but for the enticement.' The jury could well believe that the defense of entrapment was available only to an innocent man, that is, a man who had no criminal record, and was enticed. Yet that is not the law. In Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848, notwithstanding two previous narcotics convictions the Court held that Sherman had been entrapped with respect to the narcotics charge on which he was tried.

"The reference of the court to an otherwise innocent man is understandable; for the opinions of the Supreme Court in both Sorrells and Sherman refer several times to the need that the accused be an 'innocent' man. Thus, 'decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime.' Sorrells v. United States, supra, 287 U.S. at 445, 53 S.Ct. at 214. But a court opinion is not an instruction to a jury. In these opinions the Supreme Court evidently meant by 'innocent,' in connection with entrapment, absence of a predisposition or state of mind which readily responds to the opportunity furnished by the officer or his agent to commit the forbidden act for which the accused is charged. As explained in Sherman:

" 'At the trial the factual issue was whether the informer had convinced an otherwise unwilling person to commit a criminal act or whether petitioner was already predisposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotics trade.'

"Sherman v. United States, supra, 356 U.S. at 371, 78 S.Ct. at 820. Or, as further stated by the Court in Sherman when quoting from Sorrells:

" 'Entrapment occurs only when the criminal conduct was "the product of the *creative* activity" of law-enforcement officials.'

"356 U.S. at 372, 78 S.Ct. at 821. These statements largely dispel the ambiguity that arises from an unexplained reference to an 'innocent' person. If the term 'innocent' is to be used at all—it is preferable to avoid its use altogether—it should be explained so that the jury will understand that a criminal record does not disqualify an accused from defending on the ground of entrapment. A person is not entrapped when an officer merely presents him with the opportunity to commit an offense in order to detect crimi-

> nality rather than to instigate it. But readiness or predisposition is not established by evidence that the person is not 'innocent' in that he has a criminal record. Innocent in the context of entrapment means that the defendant would not have perpetrated the crime for which he is presently charged but for the enticement of the police official. The defendant, in such circumstances, must be considered a previously innocent person. A criminal record is relevant in regard to a predisposition or propensity, but does not preclude the defense of entrapment."

The similarity between the trial court's charge in this case and the charge denounced in *Hansford* is apparent. Each trial court informed the jury that the defense of entrapment is based upon the policy of the law not to ensnare an innocent person into the commission of a crime but if the defendant on trial was "inclined to commit a criminal offense" or "was ready and willing to violate the law," the defense was not available to him. However, the trial court in petitioner's case went even further and said to the jury, in express language, that if petitioner is not an innocent person, *or* if petitioner were engaged in similar activities or crimes, *or* was ready and willing to violate the law, that entrapment is lawful. The decision of the Sixth Circuit in this case is clearly in conflict with the District of Columbia Circuit's *Hansford* decision.

We are not here dealing with an instance where a police officer or agent makes a misrepresentation concerning the identity of the purchaser of illegal narcotics as in *Lewis* v. *United States*, 87 S.Ct. 424 (1966); or a situation in which trial counsel explicitly conceded that the entrapment issue was for the jury to resolve on conflicting evidence, such as was involved in *Osborn* v. *United States*, 87 S.Ct. 429 (1966); or where the defendant had a predis-

position to commit the offense charged, as in *Sorrells* v. *United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932).

Mr. Justice Stewart delivered the opinion of the Court in *Osborn*. Footnote 10 of the majority opinion, which appears at 87 S.Ct. 434, provides as follows:

> "The petitioner's trial counsel explicitly conceded that the entrapment issue was for the jury to resolve."

Footnote 11 of the Osborn case provides, inter alia:

> "Moreover, it is settled that when the defense of entrapment is raised, evidence of prior conduct tending to show the defendant's predisposition *to commit the offense charged* is admissible. See Sorrells v. United States, 287 U.S. 435, 451, 53 S.Ct. 210, 216, 77 L.Ed. 413." (Emphasis ours)

Evidence of prior conduct tending to show the defendant's predisposition to commit other offenses was admissible in this case, not to negate entrapment, but because the proof of the other offenses was essential to the government's case. The government in its brief before the Court of Appeals, on page 15 thereof, stated:

> "It was shown by proof that the appellant, often ordering these gambling supplies with intent to operate the gambling casino, 'thereafter' operated same in violation of the gambling laws of the State of Tennessee, thus consummating the offense. Such proof was not only, relevant and material, *it was essential.*"

We have been unable to find a case in which the instruction given by the trial court was challenged and the instruction upheld. This is not to say that the charge given by the trial court would be improper in a case where there was no testimony in the record that the accused was guilty of violating state law, and thus no possibility of misleading the jury.

In all of the cases cited in the opinion of the Court of Appeals, there was no possibility that the jury could misunderstand the trial court by the instruction that unlawful entrapment is not established if the defendant were ready and willing to violate "the law." See *Jordan* v. *United States*, 348 F.2d 433 (C.A. 10, 1965), where no objection was made to the charge and there was no evidence of any violation of state law; *United States* v. *Thompson*, 366 F.2d 167 (C.A. 6, 1966), where the defendants were members of the County Council of McMinn County, Tennessee, and there was no evidence of any prior violation of state law; *United States* v. *Littwin*, 338 F.2d 141 (C.A. 6, 1964), which involved the bribery of an Internal Revenue Agent, there was no objection made to the instructions and there was no evidence of any prior violation of state law; *United States* v. *Head*, 353 F.2d 566 (C.A. 6, 1965), where the accused was charged with the illegal possession of and an attempt to sell counterfeit money and there was no evidence of any prior violation of state law to mislead the jury; *United States* v. *Cooper*, 321 F.2d 456 (C.A. 6, 1963), where the accused was charged with the sale and possession of narcotics, there was no record of any prior violation of state law, and the Court of Appeals, Sixth Circuit, distinguished *Hansford* on its facts; *United States* v. *Williams*, 319 F.2d 479 (C.A. 6, 1963), where the accused was charged with the possession and illegal transfer of marihuana, and there was no testimony in the record that the accused had any propensity to violate state law; *Lathem* v. *United States*, 259 F.2d 393 (C.A. 5, 1958), where the accused was charged with sales of morphine sulphate, and there was no evidence in the record that the accused had any predisposition to commit crimes other than sales of drugs contrary to Federal law; *Accadi* v. *United States*, 257 F.2d 168 (C.A. 5, 1958), where the accused was charged with a conspiracy to acquire and

transfer marihuana, and there was no evidence of any propensity to violate state law; and *Robinson* v. *United States*, No. 784, certiorari denied 87 S.Ct. 717 (1967), facts and opinion, 366 F.2d 575 (C.A. 10, 1966), where the instruction given by the trial court included "previous purpose or intent to commit *the offense charged* * * *."

The charge given by the trial court was erroneous, and there is certainly more than a reasonable possibility that the charge contributed to conviction. See *Fahy* v. *State of Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963). Expressing the matter differently, the Court of Appeals for the Sixth Circuit, and no other reviewing court, could declare that the erroneous charge was harmless beyond a reasonable doubt. *Chapman* v. *State of California*, 87 S.Ct. 824 (1967).

It was held in *Bollenbach* v. *United States*, 326 U.S. 607, 614, 66 S.Ct. 402, 90 L.Ed. 350, 355 (1946):

> "A charge should not be misleading. See Agnew v. United States, 165 U.S. 36, 52, 41 L.Ed. 624, 630, 17 S.Ct. 235. Legal presumptions involve subtle conceptions to which not even judges always bring clear understanding. See Thayer, Preliminary Treatise on Evidence (1878) cc 8 and 9; Wigmore, Evidence 3d Ed. par. 2490-2540; Morgan, Some Observations Concerning Presumptions (1931) 44 Harvard L. Rev. 906; Denning, Presumptions and Burdens (1945) 61 Law Quart. Rev. 379. In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

It was held in *Morissette* v. *United States*, 342 U.S. 246, 276, 72 S.Ct. 240, 256, 96 L.Ed. 288 (1952):

> "Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges. They might have concluded that the heaps of spent casings left in the hinterland to rust away presented an appearance of unwanted and abandoned junk, and that lack of any conscious deprivation of property or intentional injury was indicated by Morissette's good character, the openness of the taking, crushing and transporting of the casings, and the candor with which it was all admitted. They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter."

The granting of the Special Requests of the Defendant, Nos. 1, 2, 3 and 4 (App. 347a-350a) would have cured the error of the trial court in instructing there was no entrapment unless "the defendant had no previous disposition to violate the law" and entrapment is not established if the defendant "was ready and willing to violate the law." (App. 336a)

This Court held in *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 408, 67 S.Ct. 775, 91 L.Ed. 973, 985 (1946):

> "No matter how strong the evidence may be of an association's or organization's participation through its agents in the conspiracy, there must be a charge to the jury setting out correctly the limited liability under Sec. 6 of such association or organization for acts of its agents. For a judge may not direct a verdict of guilty no matter how conclusive the evidence. There is no way of knowing here whether the jury's verdict was based on facts within the condemned instructions, note 19 above, or on actual authorization or ratification of such acts, note 18.

> "A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction. We are of the opinion, therefore, that the judge should have instructed the jury as to the limitations upon the association's liability for the acts of its agents under Sec. 6. The error is aggravated by the failure to give the correct charge upon request."

The granting of the special requests would have presented the law of entrapment to the jury in such a way as not to mislead the jury, and would have resulted in a verdict of not guilty on all six counts of the indictment.

The Assistant United States Attorney who argued this case in the trial court in his closing argument (App. 327a-328a) anticipated and capitalized on the failure of the trial court to grant the special requests. He argued "the situation in Tipton County" to the jury rather than a violation of the laws of the United States. The trial court's charge as given, the trial court's error in failing to grant the special requests, and the remarks made by the Assistant United States Attorney to the jury, taken as a whole, left an indelible impression on the jury that it was its function to enforce the gambling laws of the State of Tennessee, and not to concern itself overmuch with the question of whether petitioner was entrapped. The record as a whole demonstrates that petitioner was thereby deprived of his liberty without due process of law contrary to the *Fifth Amendment*.

3. Whether the undisputed testimony of the prosecution's witnesses establishes entrapment as a matter of law.

The Court of Appeals appended a part of the "cease and desist agreement" to its opinion. Petitioner's defense of entrapment was not based upon the "cease and desist agreement" executed by Stahl in September or October

of 1964, but on the oral instructions given to Stahl in May of 1964. The implication was clear that the officials knew Stahl would rely on their advice and that Stahl knew, from the size of the orders, that petitioner was an entrenched operator conducting an unlawful gambling business. There was no conflicting evidence for the jury to pass on in this case. Entrapment should have been determined by the trial court as a matter of law, prior to the introduction of the agreement into evidence.

The material oral misrepresentations were relayed to the petitioner via Stahl irrespective of the "cease and desist agreement." Stahl relied on what the government agents, acting within their apparent authority, advised him, and the petitioner relied on that same advice (App. 281a and 282a).

The Court of Appeals overlooked two controlling precedents in its determination of this case. One is *Cox* v. *State of Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) and the other is *Raley* v. *Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959).

Petitioner submits that *Cox* and *Raley*, when read together, stand for this overlong proposition: If the uncontradicted testimony shows that a state or the federal government, by means of a lawfully designated agent holding apparent authority, makes an erroneous administrative determination touching a subject on which reasonable persons might differ, to an accused, either directly or through a third party, that the doing of a specific act does not constitute an offense against that government; and the accused, relying on such erroneous advice, does the very unlawful act he was advised he could do lawfully, then such constitutes entrapment as a matter of law, and a conviction for the doing of such act cannot stand.

Two cases styled *Cox* v. *State of Louisiana* were decided by this Court on January 18, 1965. Cox was arrested and charged with four offenses under Louisiana law—criminal conspiracy, disturbing the peace, obstructing public passages and picketing before a courthouse. The first three offenses were disposed of in *Cox* v. *State of Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965), which is not controlling here; however, the first *Cox* case, disposing of the three offenses, contains most of the relevant facts from which this Court determined the second *Cox* case, concerning the picketing before a courthouse charge.

Police Chief Wingate White testified that *he told Cox* that "he must confine" the demonstration "to the west side of the street." The officers said nothing to the other 1,999 demonstrators (379 U.S. at 543, 85 S.Ct. at 457).

The students were then directed *by Cox* to the west sidewalk, across the street from the courthouse, 101 feet from its steps. The students obtained their information from Cox only (379 U.S. at 543, 85 S.Ct. at 457).

This Court rejected Cox's contention that the Louisiana statute was invalid on its face as an unjustified restriction upon freedoms guaranteed by the *First* and *Fourteenth Amendments* (379 U.S. at 560-566, 85 S.Ct. at 479-482).

This Court also rejected Cox's contention that his conviction violated due process, on his theory there was no evidence of intent to obstruct justice or influence any judicial official as required by the Statute (379 U.S. at 566 and 567, 85 S.Ct. at 482).

This Court did find entrapment as a matter of law and stated:

> "* * * appellant was advised that a demonstration at the place it was held would not be one 'near' the courthouse wthin the terms of the statute." (379 U.S. at 571, 85 S.Ct. at 484)

The appellants in *Raley* were informed that they had a right to rely on the privilege against self-incrimination. The Ohio Supreme Court, however, held that the appellants were presumed to know the law of Ohio, and that the Ohio immunity statute deprived them of the protection of the privilege. This Court held (360 U.S. 425, 79 S.Ct. 1260):

> "We hold that in the circumstances of these cases, the judgments of the Ohio Supreme Court affirming the convictions violated the Due Process Clause of the Fourteenth Amendment and must be reversed, except as to one conviction, as to which we are equally divided. After the Commission, speaking for the State, acted as it did, to sustain the Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him. We agree with that part of Judge Stewart's dissenting opinion in the Ohio Supreme Court in which he said: 'since the defendants were apprised by the commission at the time they were testifying that they had a right to refuse to answer questions which might incriminate them, they could not possibly in following the admonition of the commission be in contempt of it * * *.'"

At least one state court has recognized the proposition that a conviction by "bureaucratic entrapment" is a deprivation of due process of law. In *People* v. *Markowitz*, 18 N.Y.2d 953, 277 N.Y.S.2d 149 (1966), a defendant on a number of occasions had been told by the Department of

Markets that he did not need a license to sell scorecards outside Yankee Stadium. He was convicted in the lower court for doing the exact thing which he had been advised by officials holding apparent authority that he could do lawfully. The Court held:

> "Judgment reversed and the complaints dismissed. Conviction under the peculiar facts presented in this particular case constitutes a deprivation of due process of law (N.Y. Const. Art. I, Section 6; U.S. Const., 14th Amdt.; Cox v. State of Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487)."

The witness Stahl did not know whether shipping dice, poker chips and playing cards to an entrenched gambling operator carrying on an unlawful gambling business was a violation of the law, just as Reverend Cox did not know whether he was picketing "near" the courthouse. The officers in Chicago had no duty to advise Stahl, and the officers in Baton Rouge had no duty to advise Cox; however, having undertaken to advise them, the officers had a duty not to entrap them.

The only logical course of action for Stahl to follow after the conference with Reagan and Glenville was the action the record clearly shows he followed, which was to answer any inquiries from entrenched gambling operators that it was legal for him to ship them dice, poker chips and playing cards (App. 283a). To say that Glenville and Reagan did not entrap Akins is tantamount to a person shouting "Fire" in a crowded theater and explaining later that he did not tell the people to trample each other. Stahl was just as much the agent of Glenville and Ramsey as Cox was the agent of Chief White.

Chief White's administrative interpretation of the word "near" was made not to the demonstrators, but solely to Cox. The students were directed *by Cox*, and not by the

officers, to the west sidewalk, across the street from the courthouse. What would have been the action of this Court if all of the demonstrators except Cox were arrested? In that event, we would have a case in which the governing authority used Cox, just as the governing authority used Stahl, as their unwilling agent to entrap the remaining 1,999 demonstrators. Petitioner contends that this Court would have reversed the convictions of the other 1,999 demonstrators just as surely as if Police Chief Wingate White told each and every demonstrator separately that the demonstration must be confined "to the west side of the street." (379 U.S. at page 541, 85 S.Ct. at page 457).

Under all of the circumstances, in the *Cox* case and in this case, after the public officials acted as they did, to sustain either conviction "would be to sanction an indefensible sort of entrapment."

Raley involved four appellants. Had all four of the appellants been placed in one witness room; Mrs. Morgan was called first, she was informed by the Commission that all four of the witnesses had a right to rely on the privilege against self-incrimination; Mrs. Morgan completed her testimony and retired to the same witness room; she informed the other three witnesses that the position of the Commission was that each had a right to rely on the privilege against self-incrimination; Raley was called to testify; he testified exactly as he did in the reported case; he was not specifically ordered to answer, but he was later prosecuted and convicted. Would the decision of this Court have been different merely because the Commission used Mrs. Morgan as their unwilling agent to transmit the message to the remaining three witnesses?

Petitioner contends that Stahl and Akins should no more be "presumed to know the law" than should the witnesses

in *Raley*. All of the evidence shows they did not know the law; otherwise, their telephone conversation would have had an entirely different result.

There is another compelling reason why it should be held that the trial court erred in holding under the facts that there was no entrapment as a matter of law. As in *Sherman* v. *United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958), the trial court did not choose between conflicting witnesses, nor judge the credibility of the witnesses. All of the witnesses testified to the same set of facts. Aside from calling Sherman C. Magidson, the attorney for the witness Stahl, the defense called no witnesses. The conclusion of the trial court should have been reached from the undisputed testimony of the prosecution's witnesses, none of whom testified that the appellant had any predisposition to commit the offense charged.

In *Sherman*, petitioner was convicted under an indictment charging three *sales* of narcotics (356 U.S. 370, 78 S.Ct. 820). There was no evidence that Sherman himself was in the trade (356 U.S. 375, 78 S.Ct. 822). The Court in *Sherman* held (356 U.S. at pages 375 and 376, 78 S.Ct. at page 822):

> "The Government's additional evidence in the second trial to show that petitioner was ready and willing to sell narcotics should the opportunity present itself was petitioner's record of two past narcotics convictions. In 1942 petitioner was convicted of illegally selling narcotics; in 1946 he was convicted of illegally possessing them. However, a nine-year-old sales conviction and a five-year-old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics at the time Kalchinian approached him, particularly when we must assume from the record he was trying to overcome the narcotics habit at the time."

We submit that under the facts of this case, in light of *Cox, Raley, Sherman* and *Markowitz,* there was entrapment here as a matter of law, and appellant's motion for acquittal should have been granted as to all of the counts in the indictment.

CONCLUSION

Petitioner respectfully submits that a review of the record would indicate that this petition for writ of certiorari should be granted, and that the judgment of the Circuit Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court for the Western District of Tennessee, Western Division, should be set aside, and the judgment of conviction reversed.

Respectfully submitted,

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